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AMENDMENT OF THE LAW OF SEDITION.

Seldom has a more momentous piece of legislation been brought forward before the Vice-regal Council than the proposed amendments in the law of sedition of which notice has been given by the Government, and which will have to be considered by the Council during the present session. These amendments are said to have been suggested by the recent prosecutions for seditious writings in this country and to be the result of a cool and deliberate consideration on the part of the Government. We must, in the first place, render our thanks to the Government for its rejection of the proposal to re-enact a press law similar to the Vernacular Press Act of 1878, and for its refusal to differentiate between journals with reference to the language of publication. While declining to yield to the demand in certain quarters for the enactment of a Vernacular Press Act, the Government have felt bound to propose certain amendments in the Indian Penal Code and the Criminal Procedure Code with the object of bringing offenders against the law of the land more promptly to book. The reasons adduced for the introduction of the amendment of S. 124-A are, that the language of the section as it stands is not sufficiently clear and explicit, and that it is desirable to bring the law more clearly into accord with the law in England. It is pointed out by the Honorable Mr. Chalmers that, with the exception of the clause relating to the promotion of ill-will between different classes of Her Majesty's subjects, the proposed amendment in no wise alters the law at present in force in India. Admitting as the Honorable gentleman does, that the High Courts of Calcutta, Bombay and Allahabad have substantially agreed in their interpretation of S. 124-A and interpreted it in accordance with the English law, it would seem that the language of the section is not after all so doubtful

or obscure as to call for amendment. If the different High Courts had taken different views of the law, it would certainly have been necessary to set the matter at rest by a clear and authoritative enunciation of the law. But the mere fact that the decisions adopted in Bombay, Calcutta and Allahabad are not technically binding on other High Courts does not appear to be a sufficient reason for the amendment in the absence of any ground for an apprehension that other High Courts will not follow the same view. It is somewhat unusual to find the Legislature considering the advisability of amending a provision of law, merely because counsel for the defence in certain cases have contended for a particular interpretation of it, while, as a matter of fact, that contention has not prevailed with any of the superior courts, and the section has been interpreted by all those courts in the very manner in which the Legislature thinks it ought to be interpreted. Mr. Chalmers is right in stating that it was the intention of the late Sir James Fitz-James Stephen in introducing the present section 124-A to assimilate the law in India to the law in England. But as to the success of the attempt, Mr. Chalmers evidently holds a different opinion from that held by Sir James Stephen himself. While it was the opinion of Sir James Stephen that the present section (proposed by him) "was substantially the same as the law of England at the present day, though it was much compressed, much more distinctly expressed and free from a great amount of obscurity and vagueness with which the law of England was hampered," the present Law Member is evidently of opinion that the section is far from being a model of clear drafting. We are fully aware of the abilities as a draftsman of the Honorable Member to whom the credit of codifying the English law of Bills of Exchange is due. But, we hope, we shall not be suspected of any intention to disparage his abilities, if, in this particular matter, we prefer to follow the lead of that eminent jurist and judge who has been regarded, and justly regarded, in England, as the greatest authority in criminal law. Before considering the necessity for the proposed amendments and their character, scope and effect, it is necessary to take note of the law as it stands, and for this purpose we shall briefly pass in review the decisions that have been rendered by the different High Courts since the conviction of Mr. Tilak. The conclusion drawn from these cases by Mr. Chalmers is, that it is a criminal offence to stir

up feelings of contempt or hatred towards the Government, and that such conduct is none the less an offence, because resort to actual violence is not advocated. It has to be seen how far this conclusion is supported by the authorities relied upon by the Honorable Member.

Judges are not ordinarily in the habit of expressing their ideas with the precision or brevity of a statute. The principles which underlie judicial decisions are usually imbedded in a mass of circumstance, and the meaning of a judge has often to be tracked through a multitude of explanatory statements. A forcible illustration of our remark will be found in the judgments that have been delivered in the recent prosecutions for sedition. With reference to the interpretation of S. 124-A, the two points that really arise for consideration are, first, whether, and to what extent, the constitution, personnel, policy or motives of the Government are open to criticism, and, secondly, whether *any* feeling of dislike or ill-will against the Government would amount to disaffection, even if it was quite compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority. So far as criticisms of the measures of Government are concerned, it is admitted on all hands that they would be protected by the explanation, so long as they were consistent with the disposition described above. But in reference to criticisms of the policy, the motives or the constitution of the Government, it has been said that they are not entitled to the same latitude as criticisms of measures, and that they would not be entitled to any protection, even though they were compatible with a disposition to obey and support the authority of the Government, if only they were likely to generate a feeling of ill-will against the Government. The question shortly put is this: Is criticism of the policy or motives or constitution of the Government obnoxious to the section, even though any ill-will or discontent produced by such criticism falls far short of a desire not to obey or support the authority of the Government? The different Courts before which this question has arisen have expressed themselves rather loosely and diffusely on the point, and, though it is possible to pick out passages here and there, tending to suggest a negative answer to the question, we do not think, it can be fairly said that that was the

intention of the learned Judges. Wherever the Judges have closely approached the point at issue, they have laid down the law in terms which confer immunity upon such criticisms to the same extent as upon criticisms of measures. That it is the right construction to be placed upon the section, and that it is the construction which accords with the letter and spirit of the English Law, we have shown at length in our article in the September number. Our remarks do not, of course, cover the exposition of the law by *Strachey*, J., at the trial of Mr. Tilak. That learned Judge has no doubt laid down unequivocally that the test afforded by the explanation to S. 124-A is applicable only to criticisms of measures, and would not save criticisms of other matters likely to cause even the mildest feeling of ill-will against the Government. It has been assumed in many quarters that *Mr. Justice Strachey's* view of the law has been followed by other Judges, and that it stands forth at this moment as a true and generally accepted exposition of the law. On the other hand, it seems to us that, while referring to *Mr. Justice Strachey's* opinion in terms of that courtesy with which judges are in the habit of treating each other's opinions, and which really means very little, the learned Judges in the subsequent cases have substantially, though not obtrusively, departed from his view and laid down the construction we have advocated. To a lay mind, it may be difficult to understand how a judge can be held to have departed from the view of a preceding Judge from whom he does not dissent, and, perhaps, even claims support for his position. But the process is a very familiar one to all lawyers, and it is well known that judges are anxious to appear not to have changed the law, even when they have changed it. An open difference with another judge is always distasteful to a Judge, and the necessity for the expression of any such difference is regarded as nothing less than a misfortune. We shall now show that far from following the law as laid down by *Strachey*, J., the Judges have in subsequent cases taken a very different view of the subject.

The application in the case of Mr. Tilak for leave to appeal to the Privy Council was heard by *Sir Charles Farran*, C. J., and *Candy* and *Strachey*, J.J., and the order of the Court dismissing the application was pronounced by the *Chief Justice*. The order is a very short one, and says that the contention of the defence that there must be a direct incitement to stir up disorder or rebel-

lion went too far, and that, though the definition of *disaffection* given by *Strachey*, J., was incorrect, it could not have misled the Jury. We may observe that we do not contend that, according to the language of the explanation, a writing is not seditious, unless it is an incitement to stir up disorder or rebellion. It is of course quite sufficient to bring a writing within the section, if it is incompatible with a disposition to render obedience to, and support the lawful authority of, the Government. We do not contend that an incitement to resort to actual violence is necessary to constitute an offence. No inference against our view can be drawn from the observations of the learned *Chief Justice.* Whether the charge of *Strachey*, J., could or could not as a whole have misled the Jury, was a matter upon which different minds might come to different conclusions, and it would not be safe to assume that the *Chief Justice* and *Mr. Justice Candy* intended to endorse every statement made by *Strachey*, J., merely because they thought the Jury could not have been misled by the charge as a whole. Nor, do we think, can it be fairly said that the Judicial Committee of the Privy Council intended to express their concurrence with *Strachey*, J., in the various propositions of law enunciated by him when they declined to admit the application of Mr. Tilak for special leave to appeal. Their Lordships are also careful to qualify their order by a reference to the charge as a whole. It must also be borne in mind that the admission of an appeal to the Privy Council in a criminal matter is subject to such severe restrictions that the interference of the Privy Council is extremely and, may we say, sometimes unfortunately, rare.

The appeal in the *Pratoda* case was heard by *Sir Charles Farran*, C. J., and *Parsons* and *Ranade*, J. J., and separate judgments were delivered by the learned Judges. 'Attempting to excite feelings of disaffection to the Government' is rendered by *Sir Charles Farran* into an attempt to produce political hatred of Government as established by law, to excite political discontent and *alienate the people from their allegiance.* Later on, the learned Judge said that the article as a whole had the object of making its readers *impatient of their allegiance* to a foreign sovereign and creating in them the desire of casting off their dependence upon England; in other words, of exciting feelings of disaffection to the Government established by law in British India. The test to be

gathered from these passages is whether the writing has a tendency to alienate the people from their allegiance. In another passage, the learned Judge points out that the publication of a libel exciting to disaffection against the Government itself—the constitution established by law—may be an offence, though the libel may insist upon the desirability or expediency of obeying and supporting the Government. If the learned Judge means that the libel would be an offence, even though it insisted upon the desirability of obeying and supporting the Government, if it was really the tendency or insidious aim of the libel to produce a contrary disposition we do not differ from him. But, if by no possible construction, the libel could be held to have a tendency to produce a spirit of disobedience or unwillingness to support the Government, we do not think it can fall within the section. The learned Judge draws a distinction between a man who is at heart loyal and who disapproves of the measures of Government and a man who is a rebel at heart, though ready to obey Government and support its lawful authority. It seems to us that the distinction of the learned Judge is metaphysical rather than practical and legal. The only kind of conduct which laws and courts can enforce is external conduct; and it would be idle and impracticable for a court to embark upon an enquiry into the workings of a man's mind, even though his conduct is that of a law-abiding citizen and has no tendency to make his fellow citizens less law-abiding. So long as the words used by a person do not lead or tend to lead his fellow subjects to disobey or refuse to support the Government, it would be a most futile task to attempt an examination of his psychological condition. The section and the explanation, as they stand, lay down only an objective test. It must not be supposed from the reference to disposition in the explanation that the test is other than objective. Mr. Chalmers points out in his speech that in England the law applies a purely objective test, and that the intention is presumed from the natural meaning of the words without reference to the actual feelings of the person who used them. In our opinion, the law in India is exactly the same. The feelings of the person who actually uses the words are immaterial, and the law has nothing to do with the question, whether the heart of a person is loyal or rebellious? In India, also, the effect of the words must be judged, not with

reference to the actual feelings of this individual or that individual who might have heard them, but with reference to the general tendency to impair the disposition to obey and support the Government. While the observations of *Sir Charles Farran* in this case cannot be said to be characterized by any great self-consistency, we think that, on the whole, his judgment is in support of our view. The judgment of *Mr. Justice Parsons* is the shortest, and perhaps the neatest exposition of the law. He holds that "the word *disaffection* used in the section under discussion, 124-A, cannot be construed as meaning an *absence* or the *contrary* of affection or love; that is to say, dislike or hatred, but must be taken to have been employed in its special sense as signifying political alienation or discontent; that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist or subvert that Government or power. Used in this sense, it exactly corresponds to the closest, if not quite universally accepted use of its adjective, disaffected. To make or attempt to make a person disaffected, *i.e., to excite or attempt to excite in him a feeling of disloyalty to Government, or to create or attempt to create in his mind a disposition to disobey, to resist the authority of, or to subvert, the existing Government, is an offence under this section.*" The only qualification which we should be disposed to add to the statement of *Mr. Justice Parsons* is that, even if the feeling of disloyalty or discontent created by the writing is incompatible with a disposition to support the authority of the Government, the writing would fall within the purview of the section. *Mr. Justice Ranade* examines the English law at some length and defines *disaffection* as "a positive feeling of aversion, which is akin to disloyalty, a *defiant insubordination of authority*, or when it is not defiant, it secretly seeks to alienate the people *and weaken the bond of allegiance* and prepossess the mind of the people with avowed or secret animosity to Government—a feeling which tends to bring into hatred or contempt by imputing base or corrupt motives to it *and makes men indisposed to obey or support the laws of the realm, and which promotes discontent and public disorder.*" He thinks that the English have recognized greater freedom in the criticism of the acts or measures of Government and its officers than is permitted in attacks on the Government and the laws and constitution itself, and that it is this difference which

libels are treated as falling within the class of offences against the State, they must be punishable by reason of their tendency to disturb the foundations of Government. The only rational test, then, which should be adopted is the test furnished by the explanation to S. 124-A. It may perhaps be said that the creation of any feelings of dislike or ill-will against the Government, however mild in form or degree, is a source of danger to the State, and must be guarded against, while the creation of feelings of mere disapproval is attended by no such danger and requires no such penalties. The assumption that dislike or ill-will and disapproval are entirely distinct feelings, and that disapproval carries with it no implication of dislike is purely gratuitous. As happily pointed out by *Fitzgerald*, J., in *Regina* v. *Sullivan*, 11 Cox's Criminal Cases, p. 57 :—"The mere assertion of a grievance tends to create a *discontent*, which in a sense may be said to be seditious. But no jury if a real grievance were put forward and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the Press to call attention to the weakness or imbecility of the Government when it was done for a public good. How closely that trenches on the law of sedition? And yet, such writing when *bonâ fide* would receive protection from a Jury." But the sort of discontent or ill-will, which is necessarily incidental to the ventilation of a grievance, is not of the class which is, or ought to be, guarded against. The question then in each case must, as we have stated, refer to the degree and good faith of the criticism in respect of motives and policy rather than to the mere *factum* of it. So far as the definition of *disaffection* itself goes, we think the definition given by *Mr. Justice Ranade* is in accord with our view.

The next case in which the question arose was the *Moda Vritta* trial, in which *Sir Charles Farran* was the presiding Judge. After referring to his judgment in the *Pratoda* appeal, his Lordship summarized his opinion by saying that anything having the direct tendency of producing discontent with the existing law and which tends to produce a desire to subvert the Government as now exists in British India and replace it with a Government of another kind was *disaffection*.

In the *Moradabad* sedition case, the meaning of the section was considered by a Full Bench of the Allahabad High Court, and

the decision of the Full Bench was pronounced by *Sir John Edge*, C.J. While we are not prepared to accept the discovery of the learned *Chief Justice* of a complete harmony between the opinions of *Strachey*, J., and those of the other learned Judges in the subsequent cases, we do not think that on the whole his Lordship intends to lay down a different view of disaffection from that understood by us. His Lordship observes, "in our opinion anyone who by any of the means referred to in S. 124-A of the Indian Penal Code excites or attempts to excite feelings of hatred, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of disaffection, as that term is used in S. 124-A, no matter how guardedly he may attempt to conceal his real object. *It is obvious that feelings of hatred, dislike, ill-will, enmity or hostility towards the Government must be inconsistent and incompatible with a disposition to render obedience to the lawful authority of the Government and to support that lawful authority against unlawful attempts to subvert or resist it.*"

It seems to us on a review of these authorities that the conclusion fairly deducible from them is that the discontent, the creation of which is struck at by the section, is that discontent which is incompatible with a disposition to obey and support the Government; and that the conclusion is in harmony with the letter and spirit of the English law. Let us now see how far the claim put forward on behalf of the new amendment by the Honorable Mr. Chalmers that it embodies the result of the recent decisions in a clearer form than the existing section, is well founded. We have also to examine how far the amendment can be regarded as a closer approach to, and adoption of, the provisions of the English law.

The amendment now proposed repeals the present section 124-A, and substitutes a new section for it.

The present section.	*The new section.*
Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for	"Whoever by words either spoken or written, or by signs or by visible representation or otherwise, *brings or attempts to bring into hatred or contempt*, or excites or attempts to excite disaffection towards *Her Majesty* or the *Government, or promotes or attempts to*

The present section—contd.	*The new section*—contd.
life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.	*promote feelings of enmity or ill-will between different classes of Her Majesty's subjects* shall be punished with transportation for life or any shorter term to which fine may be added, or with imprisonment which may extend to *ten* years, to which fine may be added, or with fine."
Explanation. Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within this clause.	"*Explanation* 1:—*The expression 'disaffection' includes disloyalty and all feelings of enmity or ill-will.*" "*Explanation* 2:—*Comments on the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence.*"

The portions we have italicised represent the modifications introduced in the law by the amendment. One of the most important alterations made by the amendment is in regard to the definition of *disaffection* and to the inclusion within the section of certain other species of libels specifically. According to the explanation, *disaffection* includes disloyalty and all feelings of enmity or ill-will. The object of the explanation apparently is to make the creation of any feeling of ill-will, however mild, liable to punishment, irrespective of all questions of degree. The description now given of the term *disaffection* may be in accordance with the exposition of the law by *Strachey*, J., but it is neither scientific, nor in accordance with the result of the recent decisions in India which we have examined at some length. The real effect of these decisions is, as we have shown, to make the section strike only at those forms of discontent, which tend to shake the allegiance of the subject and make him indisposed to obey or support the Government and not to strike at that other form of discontent, which seeks to make known existing defects and secure remedies and which may be regarded as a wholesome incentive to interest in public affairs,

and as one of the necessary springs of improvement, political or social. The second explanation appears to us to be a totally superfluous and ridiculous piece of draftsmanship. The object of an explanation must be to explain something about which there might otherwise be some doubt or obscurity, and not to repeat what is already sufficiently clear without it. The explanation to the existing section is scientific, because it makes clear something which is not sufficiently made clear by the main section, namely, the degree of disaffection required to constitute the offence. Explanation 2 of the amendment, on the other hand, throws no additional light upon the meaning of the section, and is not required to protect any writing which might not be protected without it. According to this explanation, comments on the measures of Government, even if made with a view to obtain their alteration by lawful means, do not constitute an offence, *only* if they do not excite or attempt to excite hatred, contempt or disaffection. If a writing does not excite or attempt to excite hatred, contempt or disaffection, it cannot possibly fall within the section, and it requires no explanation to tell us this. According to this explanation, even if a person comments on a measure of Government *bonâ fide,* with the object of obtaining its alteration by lawful methods, he will be guilty of an offence, if incidentally or unavoidably he happens to cause any ill-will or discontent. This is certainly not the Indian law. But it is alleged to represent the English law; and we are sorry to find that this claim has been accepted without question both in the press and on the platform in this country. On the other hand, it appears to us that there is a serious departure even from the letter of the English law on the subject, and we must confess to considerable surprise at the statement that the amended section brings the law upon this point more clearly into accord with the English law. Before we quote the provision of the English law upon the subject, we may be allowed to observe that the actual English law now administered in regard to sedition cannot be gathered from the letter of the law alone, but depends very largely upon the spirit in which it is interpreted and administered and upon the machinery for its administration. The Honourable Mr. Chalmers quotes the definition of seditious intention from Stephen's Digest of the Criminal Law, Ed. 5, Art. 98. He, however, omits to quote the 2nd paragraph

of that article. While the first paragraph points out what is a seditious intention, the second paragraph points out what is not a seditious intention. The second paragraph runs as follows:— "An intention that Her Majesty has been misled or mistaken in Her measures, *or to point out errors or defects in the Government or Constitution as by law established* with a view to their reformation, or to excite Her Majesty's subjects to attempt, by lawful means, the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred or ill-will between classes of Her Majesty's subjects is not a seditious intention." It will be observed from this explanation that a person who writes without any seditious intention, as explained in this paragraph, cannot possibly be guilty of an offence, merely because the writing may incidentally produce some discontent; and this is exactly how the English law was understood by that eminent Judge *Sir James Stephen.* In moving the adoption of the present section 124-A, *Sir James Stephen* explained that to punish the doing of an act which one knew to be likely to produce disaffection might be to punish a man for doing an act which he had a right to do although it produced disaffection. He could imagine many things which a public man might have a right to do even at the expense of exciting disaffection, but which nevertheless should not be punishable. Though a person is deemed to intend the natural consequences of his conduct at the time, and under the circumstances of his conduct, there is a well-known distinction both in the English law and in the Indian law between intending a result and knowing it to be likely that a result will be caused. Notwithstanding the knowledge that a person may have that a particular consequence may ensue, he is in many cases said not to intend that result. To draw an illustration from the Penal Code, we may refer to the definition of culpable homicide in S. 299. "Whoever causes death by doing an act with the *intention* of causing death or with the intention of causing such bodily injury as is likely to cause death, or *with the knowledge that he is likely by such* act to cause death, commits the offence of culpable homicide"; and the fourth clause of S. 300 provides that "if the person committing the act knows that it is so imminently dangerous that it must *in all probability cause death,* or such bodily injury as is likely to cause death and commits such

act without any excuse for incurring the risk of causing death or such injury as aforesaid;" culpable homicide is murder. It is obvious that intending a result is treated as something distinct from a mere knowledge of the likelihood of the result; and as regards culpability, there is a difference between doing the act with the knowledge that death is the most probable result and doing the act with the knowledge that death may result. Similarly, though a certain amount of discontent may naturally follow the publication of a writing, still if the primary result which is or ought to be contemplated is not the discontent, but the remedying of some defect, the writing should not be held to be seditious.

Again, while the present section uses the words *Government established by law in British India*, the words *established by law in British India*, are omitted in the amendment. The words used in the definition of seditious intention by *Sir James Stephen* are "*the Government and constitution* of the British Kingdom as by law established". We do not see any reason for the alteration of the language of the present section in this respect. The language, as it stands, is identical in import with the language in English law. But according to the amended section the interpretation of the term *Government* would give rise to doubt and difficulty. S. 17 of the Penal Code defines *Government* as "the person or persons authorized by law to administer executive government in a presidency." It may be suggested that a writing which reflects upon the character of a member of the Executive Council of the Government of India would fall not merely within the ordinary law of defamation, but also within this special category of offences against the State and amount to sedition. Suppose a member of the Executive Council purchases lands *benami* in the name of his wife, contrary to the regulations of the Civil Service and makes a false return to the Government or is guilty of some other misconduct, the exposure of which would be in the interests of the public, but would as certainly tend to bring him into contempt. The fact that the imputation is true might by itself afford no defence. Is it reasonable that writings of this kind should be dealt with under the specially stringent law of sedition? Again if a member of the Executive Council introduces an imprudent or clumsy measure, criticism of it will naturally have the effect of bringing the author into some degree of

contempt, but it would be intolerable that such criticisms should be prohibited, merely because they produce contempt.

Again, the provision in the amended section in reference to promoting or attempting to promote feelings of enmity or ill-will, between different classes of Her Majesty's subjects is said to be adopted from the English law. But the provision is one of a dangerously vague character and has been found difficult to work even in England. In *Regina* v. *Burns*, 16 Cox's Criminal Cases, 355, the matter was considered by *Mr. Justice Cave*, who made the following observations in his charge to the jury. "Now the seditious intentions which it is alleged existed in the minds of the prisoners in this case, are: first, an intention to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matter in Church or State as by law established; and secondly, to promote feelings of hostility between different classes of Her Majesty's subjects. This is necessarily somewhat vague and general, particularly the second portion, which says it is a seditious intention to intend to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects. I should rather prefer to say, that the intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances the jury are the judges; and I put this question to the Attorney General in the course of the case: "Suppose a man were to write a letter to the papers attacking bakers and butchers generally with reference to the high prices of bread and meat, and imputing to them that they were in a conspiracy to keep up high prices, would that be a seditious libel, being written and not spoken?" To which the Attorney General gave me the only answer which it was clearly possible to give under the circumstances, "That must depend upon the circumstances." I, sitting here as a judge, cannot go nearer than that. Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, the jury must judge and decide in their own minds, taking into consideration the whole of the circumstances of the case. You may not unnaturally say that this is a somewhat vague statement of the law, and ask by what principle shall we be governed in deciding when an intention to excite

ill-will and hostility is seditious, and when it is not. For your guidance, I will read to you what was said by *Fitzgerald*, J., in the case of *R.* v. *Sullivan*, 11 Cox. C. C. 44." Here his Lordship after reading an extract from the judgment of *Fitzgerald*, J., observed :—"Now, that language was used, as I have said, in reference to a seditious libel, but changing the language so as to apply it to a speech, the principles laid down are clearly applicable to the case which you have now got before you. And,—although as a judge I can tell you no more than that the intention to incite ill-will amongst the different classes of Her Majesty's subjects may be seditious, and that it is for you to decide,—I confess, I should, if I were sitting amongst you as a juryman, go on to say something of this kind which you would or would not listen to, according as you found it to be quite in reason. It is not a matter of law which you are bound to take from me, but it is merely a matter which you would say to each other; if you think that these defendants, from the whole matter laid before you, had a seditious intention to *incite the people to violence, to create public disturbances and disorder*, then, undoubtedly, you ought to find them guilty. If from any sinister motive, as, for instance, notoriety, or for the purpose of personal gain, they desired to *bring the people into conflict with the authorities, or to incite them tumultously and disorderly to damage the property of any unoffending citizen*, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed,——if they had a real *bonâ fide* desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment".

Though the excitement of ill-will, between different classes of Her Majesty's subjects is said to amount to disaffection, we see that in practice this provision of law is applied only in cases in which there is an incitement to violence. Where a person incites any class of people to use violence towards the members of any other class and thus stirs public disorder, his conduct is certainly criminal and ought to be punishable. Whether the case is one which may be dealt with under the head of offences against the public tranquillity or under the head of offences against the State may be a question for consideration. It may be that the incitement to

violence may be of such a serious character that it ought to be dealt with under the classes of offences against the State. But if a person were to write a historical account of the habits and customs of a particular class of the community which might have the effect of subjecting the members of that class to odium or ill-will, or if a member of a religious sect were to enter into a theological controversy which might have the effect of raising angry feelings on both sides, it would be unreasonable to hold such persons guilty of the offence of sedition, so long as they did not, and had no reason to, anticipate any violence as the natural and probable outcome of their utterances. The necessity for the introduction of this portion of the amendment does not also appear to us to be sufficiently demonstrated. If we object to this provision, it is not because we approve of the promotion of ill-will between different classes, but because it may stand in the way of much innocent and lawful expression of thoughts and opinions on account of their incidentally producing ill-feeling between members of different classes.

The amendment proposed to be introduced does not thus really represent the letter of the English law. But if we consider the spirit of the English law and the method in which it is administered, we shall find that the difference between the amendment and the English law is much wider. Whatever may be the apparent rigour of the English law of sedition, there can be no doubt that it is interpreted by judges and juries in a manner most favorable to the liberty of the Press; and the Government in England does not undertake any prosecution for seditious libels except when there has been an incitement to violence. If the law were strictly administered, nearly all the leading politicians in the Opposition would, as pointed out by Mr. Labouchere, have to be arraigned for sedition. To take, for instance, the recent discussion in England on the conduct of Her Majesty's Government in regard to the Chitral affair, the leading members of the Opposition have made the most severe strictures upon the Government and charged it with gross breach of faith. There can be little doubt that such language is calculated, and intended in the most direct manner possible, to bring the Government into contempt, if not to drive them out of office. But no cabinet with any pretensions to sanity of judgment would think of directing a prosecution for seditious libel in respect of such utterances. To use the language of *Mr. Justice Cave* in *Regina* v. *Burns*,

the moral justification for a prosecution by the Government is that disturbances have actually and naturally followed the utterances. The fact that the criminal law in England is administered by judges who are trained lawyers and with the help of juries who are imbued with respect for the liberty of the Press is another circumstance which tends largely to temper the administration of the law. In India, on the other hand, except in the Presidency towns judges are the arbiters of both law and fact, but do not possess the same training and qualifications that are possessed by their English brethren. It is truer now than ever that with a small number of distinguished exceptions, judges and magistrates are not conspicuous for their legal learning or legal instincts. We need not go further for our authority on this point than to the speech of Sir Henry Prinsep in connection with the Criminal Procedure Code Amendment Bill where he refers to the want of legal experience of magistrates, It has also to be borne in mind that owing to the peculiar circumstances of the country, judges are often liable to be prejudiced, and not likely to take dispassionate views of cases. This is more likely to be the case in times of excitement when race or class feelings are likely to be aroused. The ridiculous severity of the sentence inflicted by the Sessions Judge in the *Pratoda* case argues either a considerable amount of prejudice or a serious want of judicial training and temperament, defects that are unfortunately not rare among our judges and magistrates. The conduct of the Magistrate who ordered Joglekar to furnish security for good behaviour and remanded him to jail for periods far in excess of the limits allowed by law, furnishes another instance.

From the foregoing discussion, it will be evident that the amendment now proposed of section 124-A of the Indian Penal Code cannot be regarded as substantially representing the letter, or embodying the spirit, of the English law on the subject. We have also shown that the statement that there is no departure from the law now in force in India is equally unfounded whether regard is had to the declarations of Sir James Stephen at the time he moved for the introduction of the present section or to the opinions of judges in recent cases. It is clear that there is a variance between the law now in force and the law newly proposed. We have no objection either to the re-enactment of the existing law in clearer terms or to the substantial adoption of the English law upon the point. But

we have the strongest objection to the introduction of a law which is neither the law of England, nor the law of India, but a fantastic hybrid for which no justification can be found in either the peculiarities of this country or the exigencies of the times. It seems to us that the policy underlying the new amendment is inconsistent with true statesmanship. If there are any grievances regarding the administration of the Government, if there are any defects in the constitution of the Government, if there are any blunders in the policy of the Government, which cause or are likely to cause discontent among the people, it would be the part of wisdom to permit the fullest facilities for the discussion of such grievances, defects or blunders, for the suggestion of measures of redress, reform, or remedy, and consider such discussions or suggestions in a spirit of conciliation and sympathy. It appears to us to be an unfortunate attitude for an enlightened Government to take, that it should not permit its subjects to talk freely of matters which are a source of irritation to the people, simply because it may have the incidental effect of inducing a sympathetic discontent. If there are any sources of discontent in the land, they must be removed by abolishing the causes of irritation and not by a legislative fiat. The Legislature seems to imagine that if it says 'let there be no discontent in the land,' discontent must cease to exist. We must confess we have not the same faith in the legislative cure of disaffection that is now proposed. We disapprove of the stringency of the proposed amendments, not because we have any sympathy with seditious writings, but because the question of what is fair and unfair criticism is a very delicate and a difficult one, and criticisms which are perfectly fair may be considered by persons who are the subjects of criticism or who are members of the service or class against which the criticism has been levelled, to have exceeded the bounds of fairness. The terrors of the law of sedition are likely to have the effect of stifling the expression of even genuine grievances, and producing a sycophantish press and giving rise to an undercurrent of discontent that may be more dangerous to the State than the open expression of it.

To summarize our suggestions with reference to the new section 124-A: (1) the word *disaffection* should be replaced by some word or words capable of conveying a clearer and more precise meaning; (2) it should be made clear that the word *Government* does not

refer to or include any individuals who may, for the time being, happen to have a share, large or small, in the executive administration of the country; (3) the clause relating to the promotion of ill-will or enmity between different classes of Her Majesty's subjects should be altogether expunged from the section; and (4) it should be made clear that comment on the measures, motives, policy or constitution of the Government, if made with the object of securing reforms in any matter or the redress of grievances does not fall within the scope of the section, even though such comment may incidentally produce some discontent.

If the section were re-cast in some form like the following, it would obviate the objections to which the amendment proposed by the Government is open, and the accord between the section and the English law would be a reality and not a mere delusion:—

"Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise brings or attempts to bring Her Majesty into hatred or contempt, or excites or attempts to excite feelings of disloyalty towards Her Majesty, or excites or attempts to excite, against the constitution of the British Indian Government established by law, feelings of disloyalty tending to create a disposition not to obey the lawful authority of the Government, or support such authority against unlawful attempts to subvert or resist it, or a disposition to subvert or resist the Government, or excites or attempts to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in State by law established, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to ten years, to which fine may be added, or with fine.

Explanation.—Writings or utterances intended to shew that Her Majesty has been misled or mistaken in her measures or policy, or to point our errors or defects in the administration or constitution of the British Indian Government as by law established with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in State by law established, do not fall within this section."

The proposal to amend column 8 of schedule II in the Criminal Procedure Code in the entry relating to Section 124-A, by inserting the words "Presidency Magistrate or Magistrate of the first class" after the words "Court of Session" appears to us to

be altogether uncalled for and dangerous. It is said that in many cases the machinery of an elaborate State trial would be out of place and the guilt or the position of the offender might be such as to call only for a light punishment. So long as the gist of the offence is an attack against the existence or stability of the State, and so long as the previous sanction of the Government is required for a prosecution, the trial will be a State trial in whatever *forum* it may be held. One important object of the administration of justice in any civilized country must be to induce in the minds of the people a feeling of confidence in the ability and impartiality with which justice is administered. This feeling is likely to be greatly weakened by the investiture of Magistrates of the first class or Presidency Magistrates with powers to try cases of sedition which, from their very nature, are sure to attract a large amount of public attention and interest. The powers of the superior courts to interfere on appeal or in revision are, from painful experience, not looked upon by the public as an adequate safeguard against improper convictions. Under the existing law, in convictions by the Sessions Courts in the mofussil, the accused has a right of appeal to the High Court, and in prosecutions in the Presidency Towns, the accused has the privilege of a trial by jury. The removal of these safeguards must necessarily give rise to a feeling of insecurity in the administration of justice. That this amendment will, in the matter of jurisdiction, bring S. 124-A into line with sections 326, 372, 392 and other sections is no argument at all, for the simple reason, that there is no analogy between offences primarily aiming at the State and offences primarily aiming at individuals.

The next proposal that has to be noticed is the provision for enforcing security for good behaviour which is proposed to be inserted after S. 108 of the Criminal Procedure Code. The proposed amendment is in these terms :—

"Whenever a Presidency or District Magistrate or a Magistrate of the first class specially empowered by the Local Government in this behalf has information that there is within the limits of his jurisdiction any person who either orally or in writing disseminates or attempts to disseminate or in any way abets the dissemination of any obscene, seditious or defamatory matter, such magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding twelve months as the Magistrate thinks fit to fix."

The provision is an extraordinary one and without any justification. The reasons assigned for this amendment are that a person who disseminates such matter must be regarded as a public nuisance and that he must be prevented from doing mischief by an effective warning of this kind and that it would be absurd to deal with him by an elaborate State prosecution. This provision is likely to have the effect of practically placing the Press under censorship, and giving the Government that control which they disclaim all desire of exercising. Whatever propriety there may be in guarding against the dissemination of obscene matter, we do not think that this power of warning, as it is called, should be exercised in the case of seditious or defamatory matter. It seems to us there is absolutely no reason or precedent for providing for any security in regard to the circulation of defamatory matter. A person who is aggrieved by a defamatory publication may well be left to his remedies in the civil and criminal courts to protect his reputation. Defamation is essentially a private grievance. The offence is not cognizable except upon the complaint of the person aggrieved and is allowed by law to be compounded by him. Cases of defamation very often raise intricate questions of privilege and it would be unjust that such matters should be disposed of summarily by the magistrate. As the amendment stands, a person who is alleged to have slandered another in a small circle of friends may be at once called upon to furnish security for his good behaviour. With regard to seditious matter again, it seems to be a most dangerous power to put into the hands of magistrates to enable them to call upon any person whose writings are in their opinion seditious, to furnish security. There is no analogy between the case of a breach of the peace and the case of seditious, obscene or defamatory matter. Imminent breach of the peace is a good reason for interference by preventive action under section 108 by calling for security for good behaviour. But where no breach of the peace is imminent, no harm would be done to public interests by the delay of a trial, and it would be dangerous to entrust such summary powers to magistrates. It is said that elaborate State prosecutions are unsuited to such offences. We do not see what special difficulty there is likely to be in such prosecutions any more than in others. With the exception of the fact that the sanction of the Government may have to be obtained first, prosecutions for sedition would be State prosecutions neither

more nor less than prosecutions for other offences. The absence of any right of appeal against orders by Presidency or District Magistrates to furnish security for good behaviour will convert the section into an engine of terrorism. The exercise of powers of revision by the High Court is mostly a farce and furnishes no remedy, as the High Courts are, according to their unwritten, law, reluctant to interfere except in the event of some flagrant error of jurisdiction or law.

The next amendment proposed by Government that we have to consider is the amendment of S. 505 of the Indian Penal Code. For convenience of comparison we subjoin the present section and the proposed amendment side by side.

The present section.

"Whoever circulates or publishes any statement, rumour or report which he knows to be false, with intent to cause any officer, soldier or sailor, in the Army or Navy of the Queen, to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The proposed section.

"Whoever *makes*, publishes or circulates any statement rumour or report,—

(*a*) with intent to cause, or *which is likely to cause*, any officer, soldier or sailor in the Army or Navy of Her Majesty or *in the Royal Indian Marine or in the Imperial Service troops*, to mutiny, *or otherwise disregard or fail in his duty as such*; or

(*b*) with intent to cause, *or which is likely to cause, fear or alarm* to the public, *or to any section of the public whereby they may be induced* to commit an offence against the State or against the public tranquillity; or

(*c*) *with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community*, shall be punished with imprisonment of either description which may extend to two years, or with fine or both.

The proposed section.—contd.

Exception.—It does not amount to an offence, within the meaning of this section, to make, publish or circulate any such statement, rumour or report, as aforesaid, when such statement, rumour or report is true, and is made, published or circulated without such intent as aforesaid."

The principal modifications in the law introduced by the amendment are altogether of an unprecedented character. We are not aware that any instances have occurred in recent years to call for such a provision. Nor are we aware of any similar provision of law in England. The only description of offence of a similar kind that we have been able to find in the English books is that known as spreading false news to make discord between the sovereign and nobility or concerning any great man of the realm, which is said to be a misdemeanour punishable by common law with fine and imprisonment. See IV, Stephen's Commentaries, 10th Edn., p. 224. We have not been able to discover any case of a prosecution in England for an offence of this kind within the last hundred years. The provision may be regarded as practically obsolete in England. The best remedy for any mischief likely to be caused by the spreading of false news is the freedom of the Press which, in these days of rapid communication between different parts of the world, may be trusted to publish a contradiction of the false news, immediately after its publication. If the liberty of the Press carries any bane with it, it carries the antidote also, and the evils apprehended from the liberty of the Press are sure to be corrected by the same means. The prohibition of the publication of news which is true on the ground that it may cause alarm to the public appears to us to be a retrograde measure. Mr. Chalmers states that it has been urged upon the Government that the publication of statements likely to cause people to commit offences against the law or cause fear or alarm to the public, ought to be punished irrespective of the truth or falsehood of the statement and without reference to the *bonâ fides* of the person's intentions. We do not know who is responsible for this recommendation to the Government. But, we do not think the Government has acted wisely in acting upon this

advice to any extent. The most extraordinary feature about the amendment is that it throws upon the accused the burden of proving that he published the statement or rumour without any such intention as is described in the section. The protection conferred by the exception is altogether illusory, since it will be presumed that the accused must have intended the ordinary and natural consequences of his acts; and the burden of proof thrown upon the accused is one which he will ordinarily be unable to discharge. It seems to us also that a Government which is afraid of the publication of true news is likely to sink in the estimation of its subjects.

The course of extraordinary legislation upon which the Government has now embarked has created a general feeling of uneasiness and insecurity in the minds of the people. The fear is generally entertained that the liberties of the people are likely to be at the mercy of magistrates who are armed with new powers and who may not always be able or willing to discriminate between persons who have overstepped the bounds of fair criticism and persons who have kept within those limits. If anything is calculated to produce an *absence of affection* towards the Government in the minds of the people, it is not the occasional virulence of the native Press too often provoked by the acrimony of the Anglo-Indian Press or the want of sympathy of local officials, but measures of legislation of a retrograde character like the amendments that have now been proposed.

THE INDIAN STAMP BILL.

We think the Indian Stamp Bill now before the Supreme Legislature is a considerable improvement upon the existing law. The speech of Sir James Westland introducing the bill fully explains the improvements and other changes effected. We have no mind to dwell upon the measure in detail, but we would draw special attention to a few of the more important changes proposed to be effected by the new legislation and make a few suggestions calculated to improve the measure.

There is one important point to which the attention of the Legislature does not appear to have been drawn. It is a well recognized rule, that where an instrument is lost, the presumption

is that it was duly stamped. Taylor in his work on Evidence says "Where secondary evidence is tendered to prove the contents of an instrument which is either lost or retained by the opposite party after notice to produce it, the court will presume that the original was duly stamped unless some evidence to the contrary be given." See *Hart* v. *Hart*, I Hare 1, *Crowther* v. *Solomons*, 6 C. B., 758, *Pooley* v. *Goodwin*, 4 A & E, 94; *R.* v. *Long Buckby*; 7, East, 45; and *Clos-Madeuc* v. *Carrel*, 18 C. B., 36. But where that presumption is rebutted, no secondary evidence is held receivable of the contents of the document lost or retained by the opposite party. See *Sennandan* v. *Kollakiran*, I. L. R., 2 M., 208, and *Kopasan* v. *Shamu*, I. L. R., 7 M., 440. The same rule of excluding secondary evidence has been laid down in England; see *Marine Investment Company* v. *Haviside*, L. R., 5 English and Irish Appeals, p. 624. Lord Cairns, however, remarked in the last case at p. 634, "it is always in some sense a disagreeable and sometimes an invidious thing to hold that a case should fail for want of a stamp being affixed on an instrument; and there are cases in which such a result arising from accident must be regarded with painful regret." One may add that instances often occur of a deficient stamp being affixed owing to doubt in the interpretation of the law as regards the proper duty or the class of instrument under which the particular document falls, and if in such cases the instrument happens to be lost or retained by the opposite party, it becomes a matter of deep regret that no evidence can be received of the liability evidenced by the instrument. We have not been able to understand the principle upon which this hard rule is based; and we doubt whether such a result could have been intended by the Legislature. We would, therefore, suggest that in the case of lost instruments or instruments retained by the opposite party which are found to be not duly stamped, a provision should be enacted that secondary evidence may be received on the payment of the deficient stamp duty and the penalty.

Another point of importance is the rule that, in the case of bills of exchange and promissory notes and documents liable to be stamped with one anna, they shall not be received in evidence, if they have not been duly stamped. This rule has been somewhat relaxed by the new clause added to S. 35, that "where an unstamped receipt has been given, it shall be admitted in evidence on

payment of a penalty of one rupee." We would by the way remark that this relaxation should not be confined to the mere case of the person giving the receipt bringing a suit, but should also apply where he pleads a set-off and to other cases where such receipt may be tendered in evidence. The definitions of "promissory note" and "bill of exchange" have been enlarged so as to cover instruments not till now falling within the scope of those terms. We are aware that promissory notes and bills of exchange not properly stamped are not receivable in evidence even under the English law. See *Green* v. *Davies*, 4 B. & C., 235, and *Ashling* v. *Boon* 1891, I. Ch., 568.

In the recent English Stamp Act of 1891, 54 & 55 Vic., Ch. 39, it is enacted by Ss. 37 and 14, that a bill of exchange or promissory note shall not be given in evidence or be available for any purpose whatever. We fail to see sufficient reason for the exceptional treatment of promissory notes and bills of exchange in this respect. Moreover, having regard to the difficulties at times of determining whether an instrument is a promissory note and to the demoralization sometimes caused in parties seeking to invent a previous consideration to make that the basis of a suit, we would suggest the advisability of such instruments as promissory notes and bills of exchange being made receivable in evidence, at least where they evidence non-mercantile transactions. There may be some reason why the Legislature should compel the proper stamping of such instruments in mercantile transactions at the risk of not being receivable in evidence, if not duly stamped. There is one important relaxation introduced by the Legislature in cases where a stamp of a different denomination is affixed by mistake, though of a sufficient amount; See. S. 37 of the Bill. It seems to us to be only in consonance with the rule regarding receipts and the rule last referred to, that the Legislature should deal with promissory notes and bills of exchange insufficiently stamped in the same liberal spirit.

We would also draw attention to S. 26 of the Act which appears to us to require some modification. A proviso no doubt is introduced in the case of a lease of a mine subject to certain limitations, but the section appears to us to work hardly in other cases. In the case of all leases for any considerable period where

there is a grain rent, it will be impossible having regard to the fluctuation in prices to determine beforehand the exact value upon which the stamp is payable. If the stamp happens to be paid upon the value as calculated at the current rate on the date of the instrument, it is hard to condemn the lessor to the loss of the profit arising from the rise in prices. The section rests upon the principle that the disposition of the party to value instruments at the lowest possible figure should be curbed by the risk of his losing any amount in excess of that which is covered by the stamp. But, to apply this to cases where there could be no dishonesty or intention to evade the stamp is an unjust extension of the principle. We would, therefore, suggest that instruments which require repayment in kind on a future date should not be brought within the operation of S. 26, whatever penalty may be provided for the deficient stamp duty, (See *Adarji Dorabji* v. *Rajaram Jhurakhanlal*, F. B. Bombay Printed Judgments, 1897, p. 382.)

The provisions in the new bill relating to refund and remission of stamps and penalties in Ss. 45, 49 and 51 are specially commendable. But we think the provision of various periods of time within which the application for relief should be made is to be deprecated. We would suggest a uniform period in all cases. We do not approve of the addition made to S. 75, that the Governor-General in Council may make rules prescribing the penalties to be incurred on breach of the rules made by him without any limitation as to the nature of such penalties.

As regards the duties fixed by the Act and the extension of certain definitions so as to render certain documents liable to duty, we have a few remarks to make. We do not think it right that the definition of an instrument of partition should be extended so as to cover a final order for effecting a partition passed by any civil court. This provision appears to have been enacted in the supposed view that people evade the stamp duty payable upon a partition deed by resorting to the civil courts for a decree for partition. Suits for partition are certainly not instituted with that object. And although in suits for partition where the plaintiff is in joint possession, a nominal stamp duty may alone be payable under S. 7, sub-section 4, in suits where he is excluded from possession which form by far the large majority of partition suits, court-fee is payable upon the value of the share claimed. We would, therefore, deprecate the com-

pulsory payment of an additional duty upon the decree for partition. If it is intended to make any provision with reference to the case where the plaintiff in joint possession in a partition suit escapes with a light fee, he may be made to pay the full court-fee as in cases where he is out of possession.

We are unable to approve of the principle of illustration 2 to S. 24 which requires, in cases where the mere equity of redemption is sold to a stranger, the payment of stamp upon the value of the whole property including the mortgage amount. We think, this is an addition, not altogether justifiable, to the law as it stands at present, or as it is laid down in S. 57 of the English Stamp Act of 1891. We do not think that cl. i of Art. 1 of Sch. I is well conceived. An acknowledgment should not be required to be stamped merely because it happens to be attested. Many such acknowledgments may be of value as evidence especially where the person making the acknowledgment happens to be a marksman, but it seems to us hard to make each such acknowledgment liable to duty as a bond. We would like the words "instrument recording an adoption" in Art. 3 to be made clearer so as to apply only to what is known generally as an adoption deed, and not so as to cover cases of letters or other documents merely reciting the adoption.

A somewhat drastic change is effected by Art. 49 relating to promissory notes payable on demand. Such instruments are made liable to *ad valorem* stamp duty like bills of exchange payable otherwise than on demand, but not more than one year after date. People are becoming very familiar with this class of instruments; and the change appears to us to be dictated by a desire to make more revenue. We are of opinion that there is considerable danger, for some time to come, of large transactions evidenced by such instruments becoming incapable of proof, because of the unfamiliarity of the public with this new scale of duties and the rigid provision of the law that such instruments cannot be received in evidence upon payment of the deficient stamp duty and penalty. The provision will moreover hamper mercantile men in their transactions.

NOTES OF INDIAN CASES.

Venkatramayya *v.* **Krishnayya,** I.L.R., 20 M., 319. We regret the decision in this case, though there is a good deal to be said in support of it. As regards the question of limitation, prior to the amending Act of 1892, there could be no distinction between an insufficiently stamped plaint and an insufficiently stamped memorandum of appeal. With regard to the latter, the High Court of Madras held in two cases, *Chennappa* v. *Raghunatha,* I.L.R., 15 M., 29, and *Patcha* v. *Sub-Collector of North Arcot, Ib.* 15 M., 78, dissenting from *Balkaran* v. *Gobind,* I.L.R., 12 A., 129, that the payment of the deficient stamp within the time fixed though after the period of limitation calculated up to the date of payment, would render the original presentation valid for purposes of limitation. This view has also been followed by the High Court of Calcutta: *Moti* v. *Chhatri Das,* I.L.R., 19 C., 780, and *Huri Mohun* v. *Naimuddin, Ib.* 20 C., 41. Though this view of the Madras Court has been modified by the Legislature with regard to appeals and applications for review of judgment to the extent that the presentation is to be considered proper only where the deficiency arose from mistake, the Legislature has not chosen to modify it with regard to plaints. The learned Judges who decided this case, *Shephard* and *Davies,* J. J., make no reference to the earlier Madras cases and seem to approve of the decision of the Allahabad Court. See our note in 3 M. L. J., p. 31. The question, we think, must now be considered by a Full Bench.

Balkishen Das *v.* **W. F. Legge,** I.L.R., 19 A., 434. In this case, the question was whether the transaction was a sale with a right to repurchase or a mortgage by conditional sale. It is really a question of difficulty in the particular circumstances of each case, and this has rather been enhanced by the decisions of the courts which have really failed to supply the real tests for arriving at a solution of the question. In the case under notice, we have no doubt that it was a mortgage by conditional sale as was decided by the learned Judges. The line of demarcation is so thin that it is well to abolish the distinction altogether. In a recent case which came before the High Court of Madras in which all the elements for determining that it was a mortgage seemed to be present, the Court held that it was not. *Venkata Krishna Rao* v. *Venkatachalam,* 7 M. L. J. Rep. 299.

Bhujbal *v.* **Nanheju,** I.L.R., 19 A., 450. A suit for rent in respect of lands situated outside British India was held to lie in a court within British India in whose jurisdiction the defendant resided. In *British*

South Africa Company v. *Companhia De Mocambique*, 1893 A. C. 602, it was held by the House of Lords reversing the decision of the Court of Appeal that an action for damages for trespass to land situated abroad did not lie in England. We find no reference to this case in the judgment of the Allahabad Judges though it would seem to have a material bearing.

Brij Nath De v. Chander Mohan Banerji. I. L. R., 19 A., 458 *Edge*, C. J., and *Blair*, J., rightly hold in this case that in an application for probate, the Court has no business to enquire if the property dealt with in the will was the property of the testator. Such an enquiry would open up a large field and has no connection with the genuineness of the will or the testamentary capacity of the testator.

Fakire v. Tasadduq Husain, I. L. R., 19 A., 462. The principle that there is no contribution between wrong doers laid down in the leading case of *Merryweather* v. *Nixan*, 1. Smiths L Cases 383, has been extended to cases where defendants have been made jointly liable for costs and one of them has paid them and sues the rest for their proportionate share. In the case under notice it was held that the principle applies where they have been made jointly liable for the costs, no matter whether they joined in the same defence or set up different defences and failed. Elsewhere we have commented upon its application to suits for contribution for costs, I. M. L. J. p. 2.

Moti Lal v. Makund Singh, I. L. R., 19 A., 477. We are unable to think this is a correct decision. The decree-holder as purchaser applies to be put in possession of the property purchased. He afterwards applies to execute the rest of the decree, and the question arises whether the prior application for possession can be treated as one to take a step in aid of execution. We think it cannot. It is difficult to see how the execution of the rest of the decree is aided by the application for possession. The moment the sale was effected and the purchase-money was set off towards the decree-amount, the proceedings in execution terminated; and any later proceeding for possession is a perfectly indifferent proceeding as regards the execution of the rest of the decree. The case of *Sujan Sing* v. *Hirah Sing*, I. L. R., 12 A., 399, is not altogether in support of the decision under notice, for in that case the application for the payment out of money was one calculated to effect a reduction of the decree-amount.

Sanwal Das v. Bismillah Begam, I. L. R., 19 A., 480. This case raises a question of some interest. A mortgage decree is sought to be

executed against the representative of the judgment debtor and a regular suit is afterwards brought by such representative to establish his right to the property on the ground that it was his own and not that of the judgment-debtor. Was this a question for settlement under S. 244 in execution, or could it be the subject of a separate suit? As a mortgage-decree it directed the sale of the property and a representative of the judgment-debtor could not raise any objection to the execution of the decree where the judgment debtor himself could not. An objection, therefore, that the property was his own, could not well be taken by him. We think it is therefore rightly held that S. 244 does not bar a separate suit.

SUMMARY OF RECENT CASES.

Consent decree—Setting aside—Mistake.

Wilding v. Sanderson [1897, II. Ch. D. 534, C. A.]

A consent judgment or order is meant to be only the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of court, and as such can be properly set aside on any ground on which an agreement in the terms of the order could be set aside. This is the main proposition of law which the Court of Appeal had to declare in the case in hand. Upon the particular facts of the case their Lordships decided that the consent order was to be set aside having been vitiated by mistake. In so doing, their Lordships had to lay down the following propositions of law with respect to the recision of written contracts on the ground of mistake:—

1. A written contract cannot be impeached, simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed.

2. If the apparent and ordinary meaning of the contract does not express the actual agreement between the parties and the words were used by mutual mistake, then, the above principle is inapplicable, and the contract can be avoided by either party.

3. Again, a mistake by one of the parties as to the meaning of words used may be induced by the other party, and if so induced, the principle above stated ceases to be applicable.

4. Fourthly, a mistake as to the meaning of the words used may exist along with another mistake as to the subject-matter dealt with in

the contract; and if the parties are not *ad idem* as to the subject-matter about which they were negotiating, there is no real agreement between them, and the apparent contract is void.

In the circumstances of the case, the Court of Appeal (confirming the decision of *Byrne*, J.) held that the consent order in question was one liable to be set aside on any of the last three grounds stated above.

Construction of Statute.

London County Council v. Wood [1897, 2 Q. B. D. 482.]

The Highways and Locomotives Act, 1878 (42 and 41 Vic., Ch. 77), S. 32, runs as follows:—(a county authority may . . . make bye-laws for granting annual licenses to locomotives *used* within their county." Under this Statute the London County Council enacted the following bye-law:—"No locomotives shall be *used* on any highway within the county of London until an annual license for the use of the same shall have been obtained from the Council by the owner thereof.

The respondent (an Engineer) was charged before the Magistrate with having violated the above bye-law by running a locomotive through the streets of London without obtaining the license as above required. The locomotive was not used for the purpose of rolling the highway in London, but was in the course of a journey to the County of Kent, where it was intended to be utilized. On the above facts, *Collins*, J., held that the locomotive "was used within the County of London within the meaning of the section and the bye-law, although it was not employed in road-making."

On a construction of the bye-laws in question, the learned Judge had to come to the conclusion above mentioned, because the bye-laws provided for a mitigation of the charge for a license in the case of locomotives other than steam-rollers where such locomotives are in transit only. The inference, therefore, is irresistable that the word 'used' in the bye-laws included the process of transit. But the learned Judge proceeded further and decided that the word 'user' was intended to denote the same extended meaning in the section of the Statute also; says the learned Judge: "If I borrow a horse to draw a load 10 miles off, and in order to get to that place I ride the horse there, I clearly use the horse in so doing. I use it for a purpose ancillary to the principal purpose for which it was intended to be used." *Ridley*, J., concurred in this view. Certainly this is special pleading, and would have been justifiable in the address for the prosecution. The learned Judge has unfortunately used the word 'use' in as many different senses as it occurs in the above sentence.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

The Principles of the Indian Contract Act by P. K. Nambiar, B.A., Bar.-at-Law, published by the Vaijayanti Press Madras:—Price Rs. 1-8-0. *The Hindu Law of Endowments*, by P. N. Saraswati, published by *Thacker Spink and Co., Calcutta.*

The Albany Law Journal for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).

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Suppression of Touts:—We are glad to note that at a meeting of the members of the Tanjore Bar held on the 16th of December 1897, it was resolved that a list of touts should be submitted to the District Judge and that he should be requested to take the necessary action under the Legal Practitioners' Act. We are informed that the list comprises the names of thirty nine touts. The list is rather a short one for Tanjore, but a step has been taken in the right direction, and we hope, the members of the Bar will soon bring forward other names and do their best to put down a rampant evil in whatever quarters it may lurk The persons whose names have been submitted to the District Judge should be prevented from entering the precincts of the court-house, unless they happen to be litigants themselves, and a printed list of the names should be hung up conspicuously in front of each of the courts.

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The Criminal Procedure Amendment Bill:—There are one or two points more in connection with the Criminal Procedure to which we draw the attention of the member in charge of it. The Advocate-General may enter a *nulli prosequi* in the Presidency towns. There seems to be no such power possessed by any officer in the moffusil. It will be a useful provision to confer a power upon the Advocate-General to enter a *nulli prosequi* in the moffusil also. The difficulty felt often-times by Government, where in certain criminal cases they do not wish to prosecute, in saving the criminal from prosecution at the instance of a private person, would be removed if the Advocate-General had the power here referred to. In the case of the corrupt Mamaldars, the Bombay Government was powerless to save the persons who gave the

bribe. Provision may also be made requiring the sanction of Government before the prosecution of a person offering a bribe is instituted. S. 197 may have to be modified by including the offence of abetment of corruption also.

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Mr. Tilak's Appeal before the Privy Council:—It is much to be regretted that the Privy Council was not disposed to give leave. Some conservative organs in England appear to have taken objection to Mr. Asquith, an ex-cabinet minister appearing for Mr. Tilak. We think there is more point in the reply of some of the liberal organs that it was inexpedient that the Lord Chancellor, a member of the Government that instituted the prosecution should have sat on the Committee. If there was any criminal case that deserved to be judicially considered by the Privy Council, we think, it is the case of Mr. Tilak. The question involved was of great importance to the whole Indian Press. The case has excited the deepest public interest and the question involved is undoubtedly difficult. It is of course intelligible if the Privy Council absolutely declined to hear any criminal case. The practice of the Privy Council on this subject ought certainly to possess sufficient elasticity for eliciting an opinion from the Lords of the Judicial Committee upon this case. We cannot but think that the law laid down by Mr. Justice Strachey was wrong, and that both the Full Bench of the Bombay High Court and the Privy Council were wrong in refusing leave to appeal.

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A Correction:—Our attention has been drawn to a mistake in our notice of a case dealt with by Mr. Justice Benson on the Original Side. It appears that it is not correct that a copy of the plaint was not served on the defendant as stated by us, but it was merely an affidavit of service of the plaint that was wanting. We regret, we were misled by our informant as to what occurred before the learned Judge.

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To Become still better:—Jailer: Ha, here you are again! I thought your first punishment would have made you better.

Prisoner: So it did, but I wished to become still better.—*The Green Bag.*

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A Legal Laugh:—An Irish witness was being examined as to his knowledge of a shooting affair. "Did you see the shot fired?" the Magistrate asked. "No, sorr. I only heard it," was the evasive reply. "That evidence is not satisfactory" replied the Magistrate, sternly,

"Stand down!" The witness turned round to leave the box; and directly his back was turned he laughed derisively. The Magistrate, indignant at this contempt of court, called him back, and asked him how he dared to laugh in court. "Did ye see me laugh, your Honor?" queried the offender. "No, sir, but I heard you," was the irrate reply. "That evidence is saitsfactory," said Pat. And this time everybody laughed except the Magistrate.—*The Green Bag.*

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Mr. Justice Wright.—The Law Journal writes, "the appointment of Mr. Justice Wright to the place rendered vacant by Mr. Justice Williams, together with the transfer to him of the Railway and Canal Commission work, will result in the almost total removal of his lordship from the ordinary work of the Queen's Bench Division. Mr. Justice Wright is a lawyer of great ability and is otherwise considerably gifted; he would be a really good judge but for the habit into which he has fallen of arriving too quickly at what he believes to be the point in the case and the proper method of settling it, conclusions which he not infrequently changes later on in the course of the trial without warning to those who have relied on the earlier indications." The public of Madras will not have much difficulty in finding a parallel in our local High Court.

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Frauds on Powers of Appointment.

It was once said that the donee of a power of appointment could not make his political principles run with the land. And it has been considered that an appointment will be void *in toto* if the donee inseparably attach to the gift made thereby a condition which is not authorized by the power. Vice-Chancellor Hall once laid down the rule thus—that a power given to a parent to appoint amongst his children ought not to receive a limited or narrow construction, but ought rather to be construed so as to embrace any ordinary provision which a parent might make and which might be useful or available for the children amongst whom and in whose favour the power is to be exercised. According to 'Farwell on Powers,' this view is too widely expressed, 'and if adopted would dispose of many cases of frauds on powers.' Of course, if a condition is clearly against public policy or morality, no court will give effect to it. There is an Irish case in which an appointment was made in favour of a son if he should decide to reside in France, with a gift over in case he should not so decide. The appointment was held bad, on the ground that the intention of the donee was to induce the son to reside in France by giving him property which had belonged to another

person and over which the donee had only a power of appointment. On the other hand, Vice-Chancellor Hall decided in *Hodgson* v. *Halford*, 48 Law J. Rep. Chanc. 548, where a Jewess, who had a power of appointment among her children, annexed to the appointment a clause which forfeited the share of any child who married a Christian, that the forfeiture clause was not void as against public policy. This last case has been followed by Mr. Justice Byrne in *Wainwright* v. *Miller*, 66 Law J. Rep. Chanc. 616, where there was an appointment that a share of the property should be held in trust to pay the income to a daughter until she should become a member of a sisterhood, and it was held that the appointment was good, and that when the appointed entered a sisterhood, her interest terminated. In neither of these cases was there anything contained in the instrument which created the power as to making provision in an appointment for the case of the profession or adoption by the appointees, or the persons whom they married, of any particular religious views; the conditions in question were certainly not expressly authorized by the powers of appointment, although they are such as are frequently met with when testators are disposing of their own property.—*The Law Journal.*

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Mr. Justice Bigham :—MOST LAWYERS have a good word for the new judge of the Queen's Bench Division, and to all appearance Mr. BIGHAM deserves their favourable anticipations. He is a good all-round lawyer, specially versed in commercial law; possessed of clear and rapid judgment, yet careful and industrious in working up the details of cases, and remarkable among prosperous Queen's Counsel for his conscientious refusal to accept briefs which he had not time to master. Add to this that he is in the full vigour of life, and you have the elements likely to produce a Queen's Bench judge of the good old type—thoroughly efficient in the transaction of business and thoroughly trusted by the profession. In his early days Mr. BIGHAM was one of the reporters for the WEEKLY REPORTER :—*The Solicitors' Journal.*

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The Appointment to the Mastership of the Rolls is also unexceptionable. Lord Justice LINDLEY's high reputation as a lawyer needs no exposition; his kindly disposition has made him universally popular, just as his anxious, almost passionate, desire to do justice has made him universally esteemed. Nevertheless, if we may venture to say so with profound respect, this last admirable quality has been thought to have been sometimes rather carried to excess. The Division of the Court of Appeal over which the learned Lord Justice has presided has perhaps

occasionally been more ready to administer the law as it should be than the law as it is; and when a case, for instance, like *Broderip* v. *A. Salomon & Co.* (43 W. R. 612; 1895, 2 Ch. 323), has come before the court, they, in their haste to prevent injustice, have legislated, instead of administering the law, and have sometimes caused the greatest consternation and uncertainty in legal and commercial circles. In this matter (not of the desire to do justice, but the mode of doing it) there will be a remarkable contrast between the late and the present Master of the Rolls. Lord ESHER administered justice according to the logical results of the existing law; sentiment had no place in his composition, and if the law worked wrong, all he would do was to shrug his shoulders and regret his inability to alter the law. That, after all, appears to us to be the true function of a judge:—*The Solicitors' Journal.*

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Lord Esher, The Late Master of the Rolls:—LORD ESHER was a striking figure in the legal world: his retirement from the bench is an event. Whatever opinions may be held as to his position there, no one can deny that a gap is made in the Court of Appeal which no other man is likely to fill. He impressed himself upon his colleagues, as some thought, rather too much; he impressed himself upon the bar, as many thought, a great deal too much; he impressed himself upon the suitors and the public, and they were all delighted with it, especially the lady litigants. He was not only a considerable lawyer, but a more considerable man of the world. He played for effect, and won; and the straiter sect often thought it undignified, as the straiter sect generally think it improper to find salvation by any path but their own. But Lord ESHER could not without solid qualities have won and maintained for so long a period a triumph of popularity second to none; and very solid qualities he undoubtedly had. In an ingrained aptitude for logic he was not far behind Lord BRAMWELL; in native common sense he was a worthy disciple of Lord MANSFIELD; in caustic humour he might have run a fair race with Lord BLACKBURN. Now, logic, caustic humour, and common sense, when combined with an eye for effect not much inferior to Sir A. COCKBURN'S or Sir JOSHUA REYNOLDS'S go to make a considerable personality in any line, and especially in the law.

He began his judicial career by an effective *coup*, at which all the world wondered. Being Solicitor-General, he had the courage, on the defeat of his party, to take a puisne judgeship. Of course his enemies said that he was worth no more. But it was not long before the most learned of English judges of this century (Mr. Justice WILLES) paid

him the compliment of concurring in an elaborate judgment of his to which there was nothing to add. There can be little doubt that the explanation was that he really cared for judicial work, and would not be baulked from it by shallow considerations of professional dignity. This receives fresh force from the fact that he stuck to it for nearly double the period required to earn his pension, with a pertinacity which has made men wonder why he did not end more than they wondered why he began. And his belief in his qualifications has been fully justified by his steady advance to the Lord Justiceship, and by his ending his career, at the age of eighty-three, as President of the Court of Appeal and something of a popular idol.

But no one whose memory can go back for five-and-twenty years could doubt that from the first he was in his element as a judge, and enjoyed the work as openly and as artlessly as a young lady who can dance well will enjoy a ball, just as he brought to it an equal nicety and care in the matter of dress. One of the best tests of a judge in the old days was a Guildhall sitting at *Nisi Prius*, when the list was crowded with real commercial causes. Here Lord ESHER was at his best, his *forte* being in commercial law, and especially in shipping and insurance cases. Punctually he was in his place, and eagerly at work; and no sooner was he absorbed in the case than the correctness of his attire and manners were strangely marred by the oddest of tricks. He would sit with his elbows on his desk, making a succession of expressive grimaces and chewing the end of a quill pen, to be used as a weapon, now for warning a prevaricating witness, now for pointing a poser to counsel, and now for assistance in ogling the jury: effective in all, but mostly in the latter; for few juries were strong enough to withstand the homely and telling way in which he impressed upon them his view of the facts.* His knowledge of commercial law was his sheet anchor, both here and *in banco* and in the Court of Appeal; and it is to his special training in this that we owe the fact that, next to BOWEN, he was the common law judge who shewed least bigotry in favour of common law technicalities as opposed to equity. He was not above an occasional sneer at equity, but his common sense prevented his becoming a slave of his logic, as BRAMWELL to some extent was.

It is useless to try to select, in a career of nearly thirty years, any special reports of his judgments; it would, moreover, be misleading in his case, as it is not by particular displays of learning or rhetoric that he can be judged. His was a general influence of a sort, but not of any general principle other than that of common sense caustically applied to every individual case. It was not a consuming fire like JESSEL's nor

a still, small voice of far-seeing, conscientious principle like BOWEN'S. It was more like the influence of a good day with hounds—a breezy, invigorating process for which everyone is the better, but nobody knows why. It cannot be so lasting or so pronounced as that of either of the last-named judges; but, if we mistake not, Lord ESHER did not care for that. We have said earlier that he had something of the eye for effect which marked Sir JOSHUA REYNOLDS. Sir JOSHUA painted for the day in pigments which have mostly faded, but was the most popular painter of his day, and remains the type of a great school. Lord ESHER judged for the day, and became one of the most popular judges on the bench, and will also remain the type of a great school:—*The Solicitors' Journal.*

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Lord Esher's Farewell.

On Monday last the Lord Chief Justice's Court was crowded with members of the profession desirons of shewing respect to Lord Esher. There were present on the bench, in addition to Lord Esher, the Lord Chief Justice, the Master of the Rolls, Sir Francis Jeune, Lord Justice A. L. Smith, Lord Justice Rigby, Lord Justice Chitty, Lord Justice Collins, Lord Justice Vaughan Williams, Mr. Justice Mathew, Mr. Justice Barnes, Mr. Justice Kennedy, Mr. Justice Bigham, Mr. Justice Darling, Mr. Justice North, Mr. Justice Stirling, Mr. Justice Kekewich, Mr. Justice Romer, and Mr. Justice Byrne.

The ATTORNEY-GENERAL (the Bar standing), after referring to Lord Esher's career at the Bar, said: When, my lord, in 1868, you relinquished the high position of Solicitor-General to become one of the judges of the old Court of Common Pleas, there was not a few who thought that you had somewhat abruptly terminated what might have been a great Parliamentary or forensic career. But my lord, a few months were sufficient to satisfy all, that in undertaking the great responsibilities of a judge you were accepting the duties of an office which you were well qualified to fulfil. Many of us remember the great commercial years of prosperity and the Guildhall sittings unshorn of any of their ancient glory, and can remember the trial of many causes in which your lordship's business knowledge and acquaintance with commercial affairs came out in strong relief. Your translation to the Court of Appeal in 1876, and your selection as Master of the Rolls, following one of the quickest thinkers who has ever adorned the English Bench, are steps in your career which met with universal approval and approbation. I pause not to consider whether the twenty-nine years during which your lordship

has occupied high judicial position is without precedent, but this I say, without fear of criticism, that from the day when your lordship first sat upon the bench until the day of your retirement your career has been one of continuous and increasing success. Your lordship made your court a tribunal for business men in which mercantile usages and mercantile customs were grasped and appreciated and while you endeavoured to bring to bear to the case which you had to decide, all the legal knowledge at your disposal, you never permitted any legal technicalities to interfere with what you believed to be substantial justice. We at the Bar have winced at times under the searching criticisms of our arguments—criticisms which led us to stand up, as your lordship would have wished us to stand up, against the interlocutory comments, for the moment perhaps adverse to the views which we were expressing on behalf of our clients. But your lordship's comments left no sting behind, and on reflection we felt that your great object was first to ascertain the facts, and then to endeavour to see that justice should be done. I have but one more word to say. There is one feeling to which expression must be given, and that is the conviction which has rested in the hearts of every member of the Bar of your constant and unswerving loyalty to our profession. Though you were far above us, you still wished to be one of us; you respected our wants and our aspirations; you have shared our joys and our sorrows. It is this feeling which made it impossible that you should be allowed to retire in silence; it is this feeling which will link you with us in the future as it has in the past; it is this feeling which will make you carry with you a wealth of good wishes of far more value than any feeble words in which I have expressed them; it is this feeling which makes it so difficult for me to say the word which can scarcely be uttered by friends—I mean, farewell.

Lord ESHER, in reply, after a few jocular remarks, said: It is true that on the bench, when I was in the position of an officer on the quarter-deck, I had, and was obliged to give, occasionally, words of command; but the moment one leaves the deck one is nothing but a fellow-officer, and I have been nothing but a fellow-barrister with you always. It is in that character, therefore, that I desire to speak to you to-day. Now, next came to my mind what should be the tone which I should adopt. Shall it be the tone of sadness, as of a last dying speech and confession, or shall I say that which I feel—that I am as happy as a man can feel under the circumstances in which I now am? I have been a judge assisted by you all, by most of you who are here present, by almost all the profession, for twenty years and some months. I believe myself it

is the longest period ever known during which a judge has sat on the bench as a judge. I believe so; but I am not quite sure. I have ceased to be a judge, and the Queen has given me an unusual mark of approval, and that mark and your presence here to-day, and saying what you have said, have made me not only happy, but happy as a man can possibly be. You have mentioned the mode in which, or the circumstances under which, I became a judge. Well, all I will say to all of you is this—I became a judge because I had made up my mind and will from the beginning that I would be a judge. But do not suppose that I had no checks, and that there were not occasionally times when I thought that I was what people call passed over, which never really exists, as there is nothing to pass over, because we are all equals; but what I said to myself was, "Never mind, this is but a check, but I will go on and I will get the top if it is possible to do so." I recommend that to you all. I may say this as to my own method since I was a judge—I feel confident that never on any one single occasion at any period of my judicial career have I done anything except try, from the beginning of each case until it was ended, to get at the truth of the matter. I have never allowed my attention to be called to anything else in court. I have listened to witnesses; I have listened to arguments, and I have tried to test them and to consider them as they went on; and my great desire was, first of all, to come to a right determination as to what was the truth of the case in respect of which the parties were in dispute. I speak, of course, of civil actions. I have never been an enemy to the preliminary mode of investigation before the case comes into court. I have been a supporter of the means by which the parties can bring themselves to the real issue. I think that those means are sometimes, and not seldom, abused; that people will take objections and ask questions and insist on rights which are not wanted in the particular case. But, however that may be, when once the case has come into court, my desire and effort have been to get at what is the true state of things; and whether there has been a proper compliance with the preliminary steps at that moment has become entirely immaterial. I never could bring myself to think that a judicial tribunal ought to allow a person's rights to be overthrown because there had been some mistakes made in the preliminary steps or investigations by those who were his advisers. Well, having got, as I have tried to get, at the true facts of the case, I then had to consider what was the law. I am speaking, as I have said, of civil actions and disputes between parties. The duty of the judge is to find out what is the rule which people of candour and honour and fairness in the position of the two parties would apply in respect to the matter in hand. This is the com-

mon law of England, and there is no other law. It is only the common law, but if we go to equity it is the same thing. The law of England is not a science; it is a practical application of the rules of right and wrong to the particular case before the court. And the canon of law is that that rule should be adopted and applied to the case which people of honour and candour and fairness in such a transaction would apply each to the other. Now, if that be so, if any supposed rule of law is put forward which would prevent the rule of right being applied, the supposed rule of law must be wrong; and if it ever be alleged that the law will prevent the truth being established and oblige the court to say that that is not true which is true—if ever any such rule of law is attempted to be put forward it must be wrong, and I have always said so. Now, what the rules of right and wrong in the particular case are must be determined in each particular case; but nobody can have read the reports of decisions of great judges from the earliest times in England without trying to find in those reports the mode and manner in which those judges have stated the rule of conduct of the court, and that is what is called authority. But no decision—at least, in my opinion—of any judge as to the rule of law other than in an Act of Parliament can compel any court now to say that they were prevented from deciding that to be true which was in reality true; there is no such thing in the law as a rule which says that the court shall determine that to be true which the court believes and knows to be untrue. Now, those being the rules of conduct which I have laid down for myself, I have tried to carry those rules through. I have been assisted, as you must all know, by judges sitting with me, whose aid has been to me inestimable. I have been fortunate enough to retire, as I may say, with a mark, an unusual mark, given to me—a mark which I think has never been given to any judge for mere legal conduct since the time of Lord Coke. I have received that mark from the Queen, and that mark can leave nothing for me to wish. I now have received from you this kind greeting, and I have only one painful word, as the Attorney-General has said, to use from beginning to end, and that is to say to all of you, Good-bye.

Lord ESHER then bowed to the Bar, and, having shaken hands with some of the judges, retired.

REVIEWS.

The Principles of the Indian Contract Act, by P. K. Nambiar, B.A., Bar.-at-Law, published by *The Vaijayanti Press, Madras:*—Price Rs. 1-8-0. We cannot commend this book of Mr. Nambiar. We are unable to realize what good it is intended to serve. The first part of the book appears to be a summary of the principles of the law of contract as in force in British India. Where it is not a mere reproduction of the sections, it does not appear to contain anything useful or interesting. The book requires careful revision, for the typographical and other errors are numerous. It is neatly got up and does credit to the Vaijayanti Press.

The Specific Relief Act, by Mahendra Chandra Mitra, M.A., B.L., Second Edition, published by *Mukherjee & Co., Calcutta* :—Price Rs. 5. We have received the second edition of the Commentaries on the Specific Relief Act by Mr. Mahendra Chandra Mitra. The author appears to have taken great pains in collecting the English and Indian decisions upon the subject. Mr. Nelson's book is better arranged and the practising lawyer will find it an easier book of reference. A new edition of Collett's book has been issued by a Calcutta barrister; and we cannot think the editor has added much to the usefulness of that book. There are several knotty questions in the interpretation of the sections of this Act which have not been attacked by the author with any degree of success. Writing upon S. 56, the author does not explain the nature of the relief of injunction which is a direction in *personam*. The interpretation of the various clauses of that section depends upon a correct understanding of the true nature of the remedy of injunction which is not explained by the author. Though the book is dated 1897, there is no reference to *Venkatesa Tawker* v. *Ramasami Chettiar*, I.L.R., 18 M., 338, reported in 1895. Much learning is expended upon the construction of S. 9, but we have no clear presentation of the principles which underlie the idea of possession and the determination of possessory suits. But we feel no doubt that the book will be found useful by the profession as a repertory of valuable information.

The Hindu Law of Endowments, by P. N. Saraswati, published by *Thacker Spink & Co. Calcutta.*—This volume of Tagore lectures has unfortunately been delayed in publication by the lamented deaths of the author and of his brother. The book does not come up to the high level attained by the lectures of Mr. Justice Guru Doss Bannerjee on *Marriage and Stridanam*, and of Dr. Rash Behari Ghose on the *Law of Mortgages*. There is much antiquarian learning of no particular legal significance in the first four chapters and chapters 9 and 10. Indeed as a work upon a legal topic, it might have been cut down to much smaller dimensions, if what is contained in chapters 5, 6 and 7 had alone been given to the world. We are not disinclined to have this learning and research of the author placed within our reach though embodied in a treatise on a legal subject. We commend this book to students of the historical growth of the Hindu Law in an important department and to the members of the profession.

The Law of Consent, by Hukm Chand, M.A. published by *The Bombay Education Society Press, Bombay*:—Mr. Hukm Chand has succeeded in producing another interesting book which will be found very useful by the profession. This treatise on Consent gives a full account of the case-law on the subject up to date, supported by copious extracts from the works of all the text writers, European, Indian and American, who have had anything to say on the topic in one way or another. We must confess that we do not altogether approve of the author's arrangement of the various topics with which he deals, and his language is occasionally quaint and wanting in clearness; but this is perhaps due to the nature of the subject. On the other hand, the learned author has brought a vast amount of learning to bear on the subject, and the essays are full of interesting and useful information. He has seldom attempted to suggest any solution of his own with regard to the various questions of difficulty he has discussed; but so varied are the quotations which he has drawn upon, that the work is highly suggestive. On the whole, we have much pleasure in commending the book to the profession. We hope hereafter to deal at length with some of the subjects that Mr. Hukm Chand has dealt with.